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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 475

CENTRAL HUDSON GAS & ELECTRIC CORPORATION,
Petitioner,

against

ALBERT BANKS,
Respondent,

and

NINNIE BROTHERS,
Third-Party Defendant-Respondent.

BRIEF FOR RESPONDENT, NINNIE BROTHERS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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OFFICIAL OPINION IN CIRCUIT COURT OF APPEALS

The United States District Court rendered no opinion. The opinion of the Court of Appeals, Second Circuit, is reported at 224 F. 2d 631.

Jurisdiction

The jurisdictional question is not raised by petitioner, and it appears that the plaintiff was a resident of the State of New Jersey. The petitioner is a New York corporation and Ninnie Brothers are residents of New York State.

Questions Presented

The petitioner alleges that the United States Circuit Court of Appeals erred in improperly applying the law of the State of New York. It was conceded upon the trial that the New York law was applicable. The action is based upon negligence in which the plaintiff recovered a judgment which is affirmed in the Court of Appeals, Second Circuit.

Statement

Petitioner, Central Hudson Gas & Electric Corporation maintained uninsulated high tension wires carrying 13,800 volts over a public highway in the City of Beacon, State of New York.

Plaintiff, a steel worker employed by the third-party defendant-respondent, Ninnie Brothers, in the erection of a building adjoining the highway was shocked and injured while at work on a public highway when a crane and a forty-five foot beam operated by plaintiff's fellow employee came in contact with the wires aforementioned.

The cause of action was predicated on the law of New York, as decided by the New York Court of Appeals in *Pike* v. *Consolidated Edison,* 303 N. Y. 1 (July 1951), and kindred cases, holding in effect that the owner of high tension wires over a public highway was bound to ascertain the time when the work of erecting a contemplated structure near the highway would begin so as to take steps to protect workmen against the dangers that were hidden in such wires, and it further held that he could be cast on damages for failure to take adequate steps to avoid injury to such workmen.

The record establishes, and the Court of Appeals below held, that the petitioner, Central Hudson Gas & Electric Corporation, had a thoroughly documented as well as actual knowledge of the fact that construction work was

going on in close proximity to its wires and its engineers had full knowledge of the danger to same (Plaintiff's Exhibits 3, 4, 5, 6, 7, 13, 16 (folio pages 87, 88, 1226-1229, 1300, 1565-1566, 1607, 1616-1617)). See the record for these page numbers.

It further appears from the record that the Central Gas & Electric Corporation did nothing whatsoever to protect the workmen when they had full knowledge of the dangers present. They had knowledge that this work was going on and yet did nothing at all to protect these men. The Central Hudson posted no signs or warnings of any kind that the wires it maintained over a public highway were high tension wires (1149). The Regulations and Rules of the U. S. Department of Commerce called for such cautions and signs to be erected (1148-1149). The engineers called as witnesses in this case and employed by the Central Hudson Company conceded that such safeguards were practicable (1149); they further testified that the Central Hudson had signs in petitioner's possession at the time (1149, 1249). It further appeared from the evidence in the case that while the engineers were fully aware of the possibility of an accident by way of contact between the crane here involved and the petitioner's wires, they did nothing whatsoever to ameliorate the expectable dangers which were foreseeable and which they themselves predicted (1168, 1177, 1182, 1202, 1209-1210, 1359). While at work on the highway, the plaintiff was shocked by the high voltage electricity in the petitioner's wires when a boom of a crane operated by another came in contact with those wires.

POINT ONE

The United States Court of Appeals, Second Circuit, correctly applied the pertinent New York law.

The Trial Court, in its charge to the jury and throughout the case, limited the issue of negligence to a failure to warn. It emphasized to the jury that it was not to

consider the possibility of deenergization or insulation as relevant to petitioner's care under the circumstances. This was an undue limitation of the obligation owed by Central Hudson in the maintenance of high tension wires over a public highway as evidenced by the decisions of New York State. *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1.

However, Central Hudson failed to give any warnings of the nature of its wires as was its duty under New York law. *Pike* v. *Consolidated Edison,* 303 N. Y. 1; *Carlock* v. *Westchester Lighting Company,* 268 N. Y. 345; *Braun* v. *Buffalo General Electric Co.,* 200 N. Y. 484; *Casualty Company* v. *A. L. Swett Electric Light & Power Company,* 230 N. Y. 199; *Chatfield* v. *New York State Gas & Electric Corporation,* 269 App. Div. 896; *Ward* v. *N. Y. State Gas & Electric,* 290 N. Y. 325; *Zuppa* v. *Central Gas & Electric Corporation,* 302 N. Y. 287.

The two cases cited by the petitioner, Central Hudson Company, *Troidle* v. *Adirondack P. & L. Corp.,* 252 N. Y. 483 and *Buell* v. *Utica Gas & Electric Company,* 259 N. Y. 443, were decided a long time prior to the *Pike* case, *Pike* v. *Consolidated Edison Company of New York,* 303 N. Y. 1; these two cases relied upon by the petitioner are wholly distinguishable on the facts. It will be noted in those two cases the high tension wires were maintained over private property, a vastly different situation from the instant case, at bar, where this operation took place on the *public highway* in the City of Beacon, State of New York. It is conceded and the evidence distinctly shows that the wires involved in this case were over a public highway, which eliminates, from consideration, the *Troidle* case and the *Buell* case as authorities for the contention of the petitioner.

We therefore submit that the petition of the Central Hudson Company should be denied. It has been held that sufficiency of evidence does not ordinarily induce the grant-

ing of a writ. *N. Y. Central R. R.* v. *Kinney,* 260 U. S. 340, 346 (1922). "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Pictures Co.* v. *Electric Co.,* 304 U. S. 175, 178 (1938). See McElwain, "The Supreme Court's Business Under Hughes," 63 Harv. L. Rev. 5, 13, n. 14 (1949).

"The decision of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts * * *." *Huddleston* v. *Dwyer,* 322 U. S. 232, 237 (1944).

POINT TWO

The United States Court of Appeals correctly applied the law with reference to deenergization or insulation as a measure of care.

The Trial Court removed, from the consideration of the jury the question of deenergization or insulation. The Court of Appeals, however, stated that these two elements were to be considered with respect to the duty the petitioner owed other people rightfully upon the premises where these high tension wires were located. We submit that the Court of Appeals properly applied the New York law as applied to this case.

POINT THREE

The Court of Appeals committed no error in remanding the case for a new trial on the issues of the third-party complaint.

The United States Court of Appeals in its opinion was proper in applying the New York State law with respect to the question of deenergizing and also the question of

the failure of the petitioner to insulate (8a and 10a). We submit respectfully that the opinion of Judge Clark was full and complete with respect to this feature and was correct in applying the New York State law.

We submit respectfully that for the reasons hereinbefore stated the *Troidle* case and the *Buell* case are not in point, and are not applicable to the facts in the case at bar. What should have occurred in this case was that the sole proximate cause of this accident was the negligence of the petitioner herein and for that reason the complaint, with respect to the third-party defendant, Ninnie Brothers, should have been dismissed.

We submit respectfully that the United States Court of Appeals was not in error in rending and formulating its opinion upon the failure of the petitioner to insulate or to deenergize these high tension wires.

Conclusion

It is respectfully submitted that this Petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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